

Original

RMW

FILED

JUL 25 2008

530

PETITION FOR A WRIT OF HABEAS CORPUS FOR PERSON IN STATE CUSTODY
 RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

Name Salvage Gary JS
 (Last) (First) (Initial)

Prisoner Number V17266

Institutional Address AVENAL STATE PRISON (PR)

RMW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CV 08 3572

Gary Salvage
 Full Name of Petitioner

Case No. (To be provided by the
 clerk of court)

vs.

B. LARRY, Warden

Name of Respondent
 (Warden or jailor)

PETITION FOR A WRIT OF HABEAS CORPUS

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your

petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

CRIMINAL CONVICTION

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

CONTRA COSTA Superior Court
Court

MARTINEZ
Location

(b) Case number, if known 021689-5

(c) Date and terms of sentence 12-5-03

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes ☒ No ☐

Where? AVENAL STATE PRISON
(Name of Institution)

P.O. BOX 9 AVENAL CA 93264
(Address)

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

P.C. 236/237 P.C. 273.5 (A) P.C. 245 (A) 1

3. Did you have any of the following?

Arraignment: Yes ☒ No ☐ Preliminary Hearing: Yes ☒ No ☐ Motion to Suppress: Yes ☒ No ☐

4. How did you plead?

Guilty _____ Not Guilty ☒ Nolo Contendere _____

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury ☒ Judge alone _____ Judge alone on a transcript _____

6. Did you testify at your trial? Yes ☐ No ☒

7. Did you have an attorney at the following proceedings:

- (a) Arraignment Yes ☒ No ☐
 (b) Preliminary hearing Yes ☒ No ☐
 (c) Time of plea Yes ☒ No ☐
 (d) Trial Yes ☒ No ☐
 (e) Sentencing Yes ☒ No ☐
 (f) Appeal Yes ☒ No ☐
 (g) Other post-conviction proceeding Yes ☐ No ☐

8. Did you appeal your conviction? Yes ☒ No ☐

(a) If you did, to what court(s) did you appeal?

Court of Appeal	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	<u>2007</u>	<u>denied</u>
			(Year)	(Result)
Supreme Court of California	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	<u>2007</u>	<u>denied</u>
			(Year)	(Result)
Any other court	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	_____	_____
			(Year)	(Result)

(b) If you appealed, were the grounds the same as those that you are raising in this petition? Yes ☒ No ☐

(c) Was there an opinion? Yes ☐ No ☒

(d) Did you seek permission to file a late appeal under Rule 31(a)? Yes ☐ No ☒

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes _____ No _____

Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. § 2244(b).

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

- I. Name of Court N/A
- Type of Proceeding _____
- Grounds raised (Be brief but specific):
- a. _____
- b. _____
- c. _____
- d. _____
- Result _____ Date of Result _____
- II. Name of Court N/A
- Type of Proceeding _____
- Grounds raised (Be brief but specific):
- a. _____
- b. _____
- c. _____
- d. _____
- Result _____ Date of Result _____
- III. Name of Court _____

Type of Proceeding _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result _____

Date of Result _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court? Yes ☐ No ☒

(Name and location of court)

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you need more space. Answer the same questions for each claim.

Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. § 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

Claim One: The Trial Court Imposed an Illegal Sentence

Supporting Facts: 12-5-03 Petitioner was first sentenced to a term of 25 To
Life for the above listed crimes, and then brought back to The Superior Court
and the sentence reduced to another aggravated term of 8 year which is
beyond the term and in violation of Petitioner's due process rights
for addition supporting fact see exhibits #1 thru 2

Claim Two: _____

Supporting Facts: _____

Claim Three: _____

Supporting Facts: _____

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

Do you have an attorney for this petition? Yes ☐ No ☒

If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on

July 15, 2008
Date

Gary Savage

Signature of Petitioner

PROOF OF SERVICE BY MAIL

I THE UNDERSIGNED, CERTIFY THAT I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE. THAT I

CAUSED TO BE SERVED A COPY OF THE FOLLOWING DOCUMENT:

ENTITLED: Writ of habeas Corpus / Exhibits AA-1-6, and
A1-7.

BY PLACING THE SAME IN AN ENVELOPE, SEALING IT BEFORE A CORRECTIONAL OFFICER,
AND DEPOSITING IT IN THE [UNITED STATES MAIL] AT AVENAL STATE PRISON AND ADDRESSING IT
TO THE FOLLOWING:

Attorney General Office
State of California
455 Golden Gate Ave Suite 11000
San Francisco CA 94102-3664

EXECUTED ON July 15, 20 08 AT AVENAL STATE PRISON, AVENAL CALIFORNIA

I, Gary Savage V17266 DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAW
OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

Gary Savage

SIGNATURE OF DECLARANT

Gary Savage

PRINT NAME OF DECLARANT

PRO PER.

Exhibits AAI-6

Original Writ of
Habeas Corpus

EX "A"

"Exhibits AAI-6"

MC-275

Name GARY SAVAGE ✓17260
 Address P.O. BOX-705 SA 1364
SOLEDAD, CA. 93960-0705

 CDC or ID Number _____

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

 (Court)

PETITION FOR WRIT OF HABEAS CORPUS

<u>GARY SAVAGE</u>
Petitioner
vs.
<u>B. CURRY, Warden</u>
Respondent

No. _____
 (To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

This petition concerns:

☐ A conviction

☐ Parole

☒ A sentence

☐ Credits

☐ Jail or prison conditions

☐ Prison discipline

☐ Other (specify): _____

1. Your name: Gary Savage

2. Where are you incarcerated? Soledad State Prison

3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

False Imprison by Violence/Corporal Injury to Spouse/Assault by
Force Likely.

b. Penal or other code sections: PC §236/237 PC §273.5(a) PC §245(a)(1)

c. Name and location of sentencing or committing court: Contra Costa County Superior Court

d. Case number: 021689-5

e. Date convicted or committed: 4-2-03

f. Date sentenced: 12-5-03

g. Length of sentence: Eight (8) Years

h. When do you expect to be released? 12/19/08

i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Paul Mariano, Public Defender, Contra Costa County Public
Defenders Office.

4. What was the LAST plea you entered? (check one)

☐ Not guilty ☒ Guilty ☐ Nolo Contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

The trial court imposed an illegal sentence.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who did exactly what to violate your rights at what time (when) or place (where).* (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

(SEE ATTACHED)

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

Cunningham v. California (Jan. 22,

2007) U.S. , (2007WL135678;) 2007U.S.LEXIS

1324...1-3, 12-15, 19, 21-23, 26, 30

7. Ground 2 or Ground _____ (if applicable):

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☒ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

b. Result: NA c. Date of decision: _____

d. Case number or citation of opinion, if known: NA

e. Issues raised: (1) NA

(2) _____ NA _____

(3) _____ NA _____

f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known:

NA

9. Did you seek review in the California Supreme Court? ☐ Yes. ☒ No. If yes, give the following information:

a. Result: NA b. Date of decision: _____

c. Case number or citation of opinion, if known: NA

d. Issues raised: (1) NA

(2) _____ NA _____

(3) _____ NA

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

NA

NA

11. Administrative Review:

Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

NA

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or ~~issue~~ in any court? ☐ Yes. If yes, continue with number 13. ☒ No. If no, skip to number 15.

13. a. (1) Name of court: NA
- (2) Nature of proceeding (for example, "habeas corpus petition"): NA
- (3) Issues raised: (a) NA
- (b) _____
- (4) Result (Attach order or explain why unavailable): NA
- (5) Date of decision: NA
- b. (1) Name of court: _____
- (2) Nature of proceeding: _____
- (3) Issues raised: (a) _____
- (b) _____
- (4) Result (Attach order or explain why unavailable): _____
- (5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:
- _____
- _____
15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)
- There has been no delays in litigation.

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

In Pro-Per

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

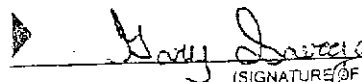
NA

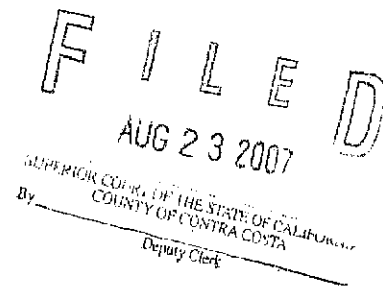
18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

NA

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 6.27-07


(SIGNATURE OF PETITIONER)



Superior Court of the State of California
In and For the County of Contra Costa

In re Gary Savage,
On Habeas Corpus.

No. 071054-1

Decision On Pro. Per.
Petition for Writ of
Habeas Corpus.

[Underlying docket
No. 5-021689-5.]

The court, on its own motion, takes judicial notice of petitioner's underlying criminal docket as set forth above.

I. Background.

On or about April 2, 2003 petitioner was convicted following jury trial of violation of PC 273.5(a), inflicting corporal injury, PC 236/237, false imprisonment by violence, and PC 245(a)(1), assault by force likely. As a so-called two striker, petitioner was sentenced to the upper term on the PC 273.5(a) count, doubled to 8 years. Sentence on the two other charges was stayed pursuant to PC 654. The actual sentence was pronounced on December 5, 2003.

II. Contentions in the Petition.

Petitioner contends the sentencing court abused its discretion and committed legal error when it imposed an allegedly illegal sentence by sentencing petitioner to 8 years at 80%, which is allegedly 5 years above the mandatory sentence a trial court

could impose without a finding by a jury. Petitioner cites and argues that the recent U.S. Supreme Court case of Cunningham v California, decided on January 22, 2007, is applicable to his 2003 sentencing and that the Cunningham case is retroactive.

For the reasons set forth below, there is no merit to the petition.

III. Discussion.

A. Apprendi, Blakely, Cunningham & Retroactivity.

The sole question presented by the instant petition is whether the Cunningham decision is retroactive to petitioner's sentencing in 2003. The simple answer to that question is "no." (See In re Gomez (August 7, 2007) __ Cal.App.4th __, 2007 DJDAR 12060, 2007 Cal.App.Lexis 1291, held: Cunningham is not to be applied retroactively to upper term sentence on collateral habeas review in cases already final when Cunningham was decided.) Petitioner's case was final when Cunningham was decided. Therefore, Cunningham does not apply to petitioner's case.

However, there are two exceptions, the so-called Teague exceptions, to the rule of non-retroactivity. New constitutional rules of criminal procedure are applicable to those cases which have become final before the new rules are announced if, and only if, it falls within one of two narrow exceptions to the general rule of nonretroactivity. A new rule is not given retroactive applications to convictions already final unless the new rule 1.) places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or 2.) could be considered a watershed rule of criminal procedure. (People v Amons (2005) 125 Cal.App.4th 855, 864 quotations omitted.)

Neither exception applies here. Cunningham does not purport to address any substantive offense (the first exception) nor does it establish a new rule that falls within the "watershed" exception (the second exception). (In re Gomez, supra, 2007 Cal.App. Lexis at 12062.)

IV. Disposition.

Petition denied.

Dated: 8/23/07

cc: Petitioner
021689-5

jj/moss27u34



John C. Minney
John C. Minney,
Judge of the Superior Court

RECEIVED
JUL 25 2008
CLERK OF THE COURT
COUNTY OF SANTA CLARA
CALIFORNIA

"Exhibits A1-7"

Attached Written Writ
of Habeas Corpus

EX. "●"

"Exhibits A1-7"

Attached Written Writ
of Habeas Corpus

1 Gary Savage ✓17266
2 P.O. Box-705 SA136L
3 Soledad, Ca. 93960-0705

4 SUPERIOR COURT OF THE STATE OF CALIFORNIA
5 FOR THE COUNTY OF CONTRA COSTA

8 GARY SAVAGE
9 Petitioner

No. _____

10 vs.

Writ of Habeas Corpus

11 B. CURRY, Warden
12 Respondent

14 I.

15 INTRODUCTION

16 1. Petitioner was charged and convicted of Penal Code
17 §273.5(a), Corporal Injury to Spouse, Penal Code §236/237,
18 False Imprison by Violence, Penal Code, §245(a)(1), Assault by
19 Force Likely, and sentenced to an aggravated term of eight (8)
20 years. Count 2-P.C. 236/237 Stayed-P.C. §654, Count 4-P.C.
21 §245(a)(1), Stayed-P.C. §654. The history in this matter
22 before the court will shed an ample amount light concerning
23 the illegal aggravated term in this case. Petitioner was first
24 sentenced to a term of 25 to Life for the above listed crimes
25 and, then brought back to the Superior Court and the sentence
26 reduced to another aggravated term of eight (8) years, which
27 is beyond the term and in violation of petitioners due process
28 rights according to the Sixth and Fourteenth Amendments of the

1 United States Constitution.

2 2. Petitioner maintains that the court acted contrary to
3 the law governing petitioners' punishment by sentencing him
4 to an aggravated term. (See Ex.A.) By placing
5 sentence-elevating factfinding within the judges's province,
6 violates a defendant's right to trial by jury safeguarded by
7 the Sixth and Fourteenth Amendments.

8 II

9 PARTIES

10 3. The Superior Court of California for the County of
11 Sacramento.

12 III

13 STATEMENT OF FACTS

14 4. Petitioner was tried and convicted of P.C.
15 §273.5(a), P.C. 236/237, P.C. §245(a)(1), which the later two
16 charges were stayed and petitioner was sentenced to eight (8)
17 years in state prison. Under California's determinate
18 sentencing law petitioners offense is punishable by one of
19 three precis terms of imprisonment. The DSL obliged the
20 trial judge to sentence petitioner to the middle term of
21 three (3) years, and not the upper term of four (4) years and
22 then doubled to eight (8) years. According to Penal Code
23 §273.5 (a), petitioner should have been sentenced to the
24 mid-range of three (3) years, petitioner has no prior
25 conviction for P.C. §273.5(a). If petitioner had a prior
26 §273.5(a), he then should be sentenced under penal code
27 §273.5(e), which is not the case.

1 5. Petitioner reiterates "Apprendi's bright line rule"
2 which Cunningham held was violated in cases such as this one.
3 Under the Due Process Clause of the [Fourteenth] Amendment
4 and the notice and jury trial guarantees of the Sixth
5 Admendment, any fact that increases the maximum penalty for a
6 crime must be charged in an indictment of information,
7 submitted to a jury, and proven beyond a reasonable doubt.
8 (Apprendi, supra, at p.476. Here, no upper-term aggravating
9 factor was either charged in the information, or submitted to
10 a jury, or proved beyond a reasonable doubt.

11 6. Petitioner was exposed to a sentence in excess of
12 the relevant statutory maximum which must be found by a jury,
13 not a judge, and established beyond a reasonable doubt, not
14 merely by a preponderance of evidence. See 530 U.S. 446,
15 490.

16 7. In all material respects, petitioners' sentence
17 resembles the sentencing system invalidated in Blakely and
18 Booker. Following the reasoning in those cases, the middle
19 term prescribed under the California law, not the upper-term,
20 is the relevant statutory maximum. If the aggravating
21 factors were applied under Penal Code §273.5(e) petitioner
22 still should only be sentenced to the middle term accordingly
23 and not the upper term and then doubled.

24 8. By California's determinate sentencing law assigning
25 to the trial judge, and not the jury, authority to find facts
26 that expose petitioner to an elevated upper term sentence.
27 By placing sentence-elevating factfinding within the judge's
28 province, violates petitioner's right to trial by jury

1 safeguarded by the Sixth and Fourteenth Amendments. Which
2 the court hold's that it does.

3 9. Unlike aggravating circumstances, statutory
4 enhancements must be charged in the indictment, which was not
5 the case in this issue before the court. Also, the under
6 lying facts must be proved to the jury beyond a reasonable
7 doubt. Penal Code :1170.1(e); Black, 35 Cal. 4th at 1257,
8 113p. 3d at 545. A fact underlying an enhancement cannot do
9 double duty; it cannot be used to impose an upper term
10 sentence and, on top of that, an enhanced term. Penal Code
11 §1170(b). Where permitted by statute, however, a judge may
12 use a fact qualifying as an enhancer to impose an upper term
13 rather than an enhanced sentence. Ibid; Rule 4.420(c).

14 10. In petitioner's case the judge should not have
15 sentenced petitioner above the standard range without finding
16 the additional facts. Consequently, that fact or facts would
17 be subjected to the Sixth Admendment's jury trial guarantee.
18 542 U.S., at 304-314. The judge in petitioner's case
19 inflicted punishment that the jury's verdict alone did not
20 allow, the jury has not found all the fact's which the law
21 makes essential to the punishment...and the judge exceeds his
22 proper authority. Criminal Procedure §,p. 55 (2d ed.1872).

23 11. Because the judge in petitioner's case could not
24 have imposed a sentence outside the standard range without a
25 jury finding additional facts the top of that range would be
26 the middle range of three (3) years according to the Penal
27 Code §273.5(a). Petitioner's abstract of Judgement reflects
28 Three charges, two (2) stayed, and one (1) P.C. §273.5(a) as

1 the controlling term. (See Ex.B)

2 12. A penalty provision that meets this criterion
3 exposing the petitioner to a greater punishment than that
4 authorized by the jury's guilty verdict, i.e., one that
5 constitutes an increase beyond the maximum authorized
6 statutory sentence is the functional equivalent of an element
7 of greater offense than the one covered by the jury's guilty
8 verdict. (People v. Seel, supra, 34 Cal.4th p.548 [quoting
9 Apprendi, 530 U.S. at p. 494, fn 19].) As it was restated in
10 Cunningham; Apprendi said that any fact extending the
11 defendant's sentence beyond the maximum authorized by the
12 jury's verdict would have been considered an element of an
13 aggravated crime and thus the domain of the jury by those who
14 framed the Bill of Rights. (Cunningham, ____ U.S. at
15 p. ____ [2007 U.S. LEXIS 1324, at pp. 23-24][citation omitted];
16 see generally Apprendi, 530 U.S. at pp. 478-483, 494, fn.
17 19].)

18 13. Futhermore, petitioner did not personally waive his
19 right to a jury trial on the issue of aggravating factors.
20 Cunningham established that a defendant has a federal
21 constitutional right to a jury trial as to all factors, other
22 than the fact of a prior conviction, that are used to impose
23 the upper term. His waiver of that right must be knowing and
24 voluntary and must appear on the record; it will not be
25 presumed. (Boykin v. Alabama (1969) 395 U.S. 238; see also
26 California Constitution, article I, section 16; People v.
27 Ernst (1994) 8 Cal. 4th 441, 445.)

IV

CONTENTIONS

By the court sentencing petitioner to the upper aggravated term it violated petitioners due process rights according to the U.S. Constitution and therefore he should be resentenced accordingly.

REQUEST FOR RELIEF

Petitioner is without remedy save for Habeas Corpus.

Accordingly, petitioner request that the court:

1. Issue a Writ of Habeas Corpus;
2. Issue an order to show cause;
3. Order the court to resentence petitioner to the appropriate term.

CONCLUSION

Thus, this court should reduce the upper term sentence to a three (3) year mid-term on count three (3), the maximum sentence permitted by the jury's verdict under Cunningham. (Penal Code § 1260; People v. Schueren supra 10 Cal. 3d at pp. 561-562.)

Dated:

6-27-07

Gary Savage

Gary Savage

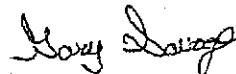
VERIFICATION

I, Gary Savage, state:

I am the petitioner in this action. I have read the foregoing petition for Writ of Habeas Corpus and the facts stated therein are true of my own knowledge, except as to matters that are therein stated on my own information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was excuted on 10/10/08, at Soledad State Prison, Soledad California.

Gary Savage



In Pro-Per

Harry Savage
A.S.P. 520-704
P.O. Box 4
Alameda Ca, 93204

Savage

RECEIVED

JUL 18 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Handwritten signature]



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